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No. 423

IN THE

Supreme Court of the United States

OCTOBER TERM 1961

FIREDOOR CORPORATION OF AMERICA,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1961

FIREDOOR CORPORATION OF AMERICA,

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit (Lumbard, Ch. J., Clark and Smith, Circuit Judges) entered herein on June 22nd, 1961. Petition for re-hearing was denied on June 29, 1961.

Citation to Opinions Below

The opinion of the Court of Appeals is reported at 291 F. (2d) 328, and is printed in the Appendix herein at pages 14 to 22.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C Sec. 1254(1). The judgment of the Court of Appeals was entered on June 22nd, 1961.

Questions Presented

1. Where the interrogations of employees by an employer *prior* to condemned conduct have been found to be legal and not unfair labor practices may such employer, under Sec. 8(c) of N.L.R.A. as amended, *after* such conduct, be ordered by the National Labor Relations Board to cease and desist from ". . . interrogating its employees as to their union . . . affiliations in a manner constituting interference, restraint or coercion"?

2. Does such an order of the N.L.R.B. impose upon an employer a species of *administrative, prior restraint and censorship* so broad and undefined as to be in derogation and destruction of the employer's statutory and constitutional rights of free speech under said Sec. 8(c) of the Act and of the First Amendment?

Statutes Involved

National Labor Relations Act as amended (61 Stat., 136, 140), 29 U.S.C., Sec. 158(c), Sec. 8(c) Taft-Hartley Act); U. S. Constitution, Amendment 1.

Statement of the Case

1. The National Labor Relations Board petitioned for enforcement of its order against Firedoor Corporation of America (hereinafter called "Firedoor") issued June 15th, 1960.

The company is a New York corporation, operating a plant in the Bronx, New York, and manufactures hollow metal steel items, consisting of metal doors, metal frames and kindred products.

Charges had been filed against Firedoor by Local 66, Architectural and Engineering Guild, A. F. Tech. Eng.,

AFL-CIO, that a so-caled Employees Bargaining Committee, acting as a labor organization, was promoted and formed by Firedoor and that it was assisted by Firedoor in its activities; that Firedoor, through its officials, promised certain benefits if the employees would refrain from becoming or remaining members of the union and if they voted against the union in an election held on April 23rd, 1959 (*in which election the union was defeated through a tie vote*).

A further charge asserted that Firedoor warned its employees to refrain from becoming or remaining members of Local 66, and to vote against the union; threatened the employees with the loss of benefits and other reprisals if they were members of the union or voted for it, and that promises were made under which benefits would be given if the employees would desist from becoming or remaining members of the union; that certain benefits alleged were denied to the employees, and that two employees were discharged because of their union membership and other concerted activity.

The Board found, *inter alia*, that Firedoor violated Section 8(a)(1) of the Act by interrogating its employees about their union activities *in a manner constituting interference, restraint and coercion.*

2. This petition relates *solely to the propriety of any future questioning* of employees of Firedoor which may be engaged in by Firedoor or by Mirsky, its supervisor of technical work, and the right of the National Labor Relations Board to enjoin "any future coercive questioning" of said employees by Firedoor or said Mirsky.

3. The Court of Appeals (Opinion, Appendix, pp. 18-20) exonerated Mirsky of the charge of committing an unfair labor practice by the manner of his interrogation of the employees; held that the interrogation of the employees was "not improper" under accepted standards; that there

was no past history of anti-union discrimination; *yet ruled* that "even though the interrogation was proper, the Board's injunction against any future coercive questioning should be enforced". The Court then went on to state (opinion, p. 20), that "the coercive and discriminatory conduct after the questioning makes it reasonable to conclude that *any future interrogation would have a coercive effect upon the employees. The Board has power to enjoin conduct other than those specific violations proved so long as there is a reasonable relation between the illegal act committed and the forbidden activity. May Stores* v. *N.L.R.B.*, 326 U. S. 376, 390 (1945); cf. *United States* v. *DuPont*, —— U. S. ——, decided May 22, 1961" (Emphasis supplied).

Reasons for Granting the Writ

1. It is our respectful submission (a) that the Board's order to Firedoor to cease and desist from "interrogating its employees as to their union . . . affiliations in a manner constituting interference, restraint and coercion . . ." was too broad and patently *ultra vires;* (b) that the ruling of the Court of Appeals sustaining the Board's order is warranted neither by logic nor supported by statutory or decisional law on the subject of the permissible ambit, scope and limits of an employer's right of free speech as fixed by Section 8(c) of the Act; (c) that the Court erred in thus *prospectively* extending the injunctive power of the Board to "future," unspecified and conjectural interrogations by Firedoor of its employees, on the sweeping hypothesis and unsubstantiated assumption that the "coercive and discriminatory conduct after the questioning" (i.e., the questioning by Mirsky, which was held proper), "makes it reasonable to conclude *that any future interrogation* would have a coercive effect upon the employees" (Emphasis supplied); (d) that where *no other interrogations* by Firedoor of its employees have as yet taken place,

or, indeed, may *never* take place (apart from the impossibility of knowing, forecasting or predicting what these may consist of), it would be illogical and unreasonable for either the Court or the Board to "conclude" *in advance* of such hypothetical future interrogations, that there will be a "reasonable relation" between any *past* allegedly unfair labor practices of Firedoor and any such future interrogations, where obviously no proof could be adduced, *in advance,* either as to the nature, scope, or content of such interrogations *before they have ever taken place,* or as to the "coercive effect," they may or may not have upon the employees; (e) that the Court erred in thus creating an artificial and unprovable *nexus* between the concededly proper and lawful interrogations by Mirsky and some "future coercive questioning" which may never occur, or if interrogations did occur, might well be found to have developed in *a wholly non-coercive* context, completely different from the situation at bar.

2. If the interrogations discussed in this record (i.e., Mirsky's) were proper, it is difficult to understand the statutory or constitutional basis upon which the Board may be granted the unrestricted power *in futuro and in vacuo,* to make a *blanket condemnation* of "any future interrogation" by Firedoor (presumably regardless of the subject matter or manner thereof), especially where it would be manifestly impossible to ascertain (except by some extraordinary feat of clairvoyance), whether such future interrogations will or will not bear "any reasonable relation" to unspecified, and unascertained, and allegedly illegal acts committed by Firedoor *in the past.*

3. Petitioner respectfully suggests (a) that the grant of such sweeping injunctive power as is foreshadowed by this ruling of the Court, would, in the absence of any specific tests, criteria, standards or limitations as to what may in the "future" constitute such "coercive question-

ing'' by Firedoor (specified in such manner or form as would fairly apprise Firedoor as to what, how far and under what specific circumstances it may or may not interrogate its employees so that it may have a reasonable opportunity to *avoid* such hypothetical ''coercive'' questioning), *result* in the unwarranted imposition upon Firedoor of a species of *administrative, prior restraint and censorship so broad and undefined,* as to be in derogation and destructive of Firedoor's statutory and constitutional rights of free speech as an employer under Sec. 8(c) of the Act; (b) that the grant of such injunctive power to the Board imposes a condition *in terrorem* upon Firedoor so pervasive and unpredictable, as to unlawfully inhibit, reduce or destroy Firedoor's right of normal, reasonable and proper communication with and interrogation of its employees; (c) that Firedoor's lawful right to communicate with and interrogate its employees in a friendly and non-coercive manner and atmosphere (as is guaranteed to it by § 8(c) of the Act and the Constitution), could, as a result of the threat of unpredictable action by the Board under such injunctive power, be exercised by Firedoor only at the risk of being charged with ''coercive conduct'' by reason of any such communication or interrogation *of whatever nature or content, or whatever the manner thereof,* with the result that normal and friendly relationships between Firedoor and its employees would be unfairly and unreasonably brought into suspicion and dispute and peaceful industrial relations disrupted, with the attendant risk of having filed against it unwarranted charges of unfair labor practices based on the mere spurious assertion that some innocent and otherwise entirely proper communication with or interrogation or other by Firedoor of its employees had or was having a ''coercive effect'' on them, although it was completely disassociated from and had no reasonable relation to or connection whatever with any past ''illegal act'' allegedly committed by Firedoor.

4. Petitioner suggests that the Court of Appeals has misread the teaching of and misapplied *May Dept. Stores Co.*, 326 U. S. 376, to the situation at bar. Further, although cited only for comparison, we find it difficult to understand the applicability herein of the recent decision of the Supreme Court in *U. S.* v. *DuPont*, 29 U. S. Law Week 4434, —— U. S. —— (decided May 22, 1961), which dealt with the proper scope of a decree in an anti-trust suit insofar as it proposed a plan for the divestiture by DuPont of its General Motors shares.

In *May Dept. Stores Co.* (*supra*, p. 392), this Court modified the decree of the Court below because the latter had refused to modify the injunction issued by the Board. This Court held (p. 342) that the injunction was too broad and applied ". . . generally to all violations under the Act of the rights of the employees . . ."; and accordingly added to the decree a clause limiting the scope of the injunction to the *specific unfair labor practice* which had been *proved*, viz. ". . . or from any other acts in any manner interfering with the *representative's efforts to negotiate for or represent the above named employees as bargaining agent . . .*" (Emphasis added).

6. The effect produced in the appeal herein, of the Court's sustaining the Board's injunction against "any future coercive questioning" is thus contrary to the doctrine of *May Dept. Stores Co., supra*—instead of confining and restricting the injunction herein to those allegedly unfair practices *proved*, it *penalizes* Firedoor and prohibits it from interrogating its employees, *although Firedoor's interrogations were held in this case to be entirely proper.* On this critical point, we refer to the concurring opinion of Mr. Justice Rutledge in *May Dept. Stores Co., supra*, at page 396—where he says ". . . In my judgment, an employer does not commit an unfair labor practice when he does no more than exercise rights secured by the Federal Constitution and the Wagner Act. . . ."

7. Likewise, we refer to the recent decision of this Court in *Communications Workers of America* v. *N.L.R.B.*, 362 U. S. 479 (May 2, 1960), in which the doctrine of the leading case on this subject, *Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, was restated at pages 480-481: ". . . It would seem . . . clear that the authority conferred on the Board to restrain the practice which it has found . . . to have (been) committed is not an authority to restrain generally all other unlawful practices *which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct. Labor Board* v. *Express Publishing Co.*, 312 U. S. 426, 433 (1941)." (Emphasis supplied.) And we may observe that the Board "seems to persist in issuing broad orders as a matter of course *even without factual or legal basis. . . .*" (*N.L.R.B.* v. *Ochoa Fertilizer Corp.* (1 C. A.) (1960), 283 F (2) 26). (See also *N.L.R.B.* v. *International Hod Carriers, etc.* (8 C. A.) (285 F. (2) 394) Dec. 22, 1960.)

8. To sustain, in this case, therefore, the Board's order relating to "any future coercive questioning", would be to confirm the power of the Board to make a scattergun charge which could easily subject Firedoor to the possibility of contempt proceedings for behavior *not substantially like or indeed, in any wise related to the findings made by the Board of alleged unfair labor practices.* We submit that it is contrary to public policy in the labor-management field and to the decisional law to put an employer in such a dilemma (*May Dept. Stores Co., supra,* at p. 402) (*N.L.R.B.* v. *Great Atlantic & Pacific Tea Co.* (5 C. A.), 277 F. (2) 759 (Apr. 1960), and see cases cited in footnote 6 of page 765; also *N.L.R.B.* v. *Intl. Assoc. of Machinists* (9 C. A.) 279 F. (2) 761 (July 1960).

9. The injunctive power should be exercised sparingly and with caution. The limitations attending upon its exercise are based in great part on Supreme Court decisions in

this area of labor law. (*N.L.R.B.* v. *Local 450, etc.* (5 C. A.), 275 F. (2) 413 (Apr. 1960), and cases cited in footnote 6 p. 418). It seems well-settled that ". . . If the wrongs complained of and against which injunctive relief is sought are alleged violations of a statute in certain particulars, the decree may restrain the defendant *from further like violations of the act, but should not enjoin in general terms* violations of the act in the future in any particular, because an injunction of such general character would be violative of the elementary principles of justice in that it *would compel the defendant thereafter to conduct himself and his business under the jeopardy of punishment for contempt for violating a general injunction. . . .*" (28 American Jurisprudence Injunctions, Sec. 300, pp. 472-473.) (Emphasis supplied.)

10. If it is conceded that the interrogations in question were in all respects proper, can it be fairly "concluded" that this demonstrates a proclivity for "future coercive, questioning" which must be enjoined? In sum, is it reasonable or proper for the Court of Appeals to approve, *in advance,* an order of the Board which may well cover activities of a nature *different from those found to be illegal,* where there has been no evidence whatever of Firedoor's attempts or intentions, *in advance,* to circumvent the Board's decision?

11. The determination as to whether an employer's anti-union activities are unfair labor practices depends on the context in which those activities occur. (*N.L.R.B.* v. *United Steelworkers,* 357 U. S. 357; *N.L.R.B.* v. *Virginia Elec. & P. Co.,* 314 U. S. 469; *Int'l Assoc. M.T.D.M.L.U., N.L.R.B.,* 311 U. S. 72.) But contrary to the issues raised in *United Steel Workers* (*supra,* p. 369), this case is *specifically concerned* ". . . with the possibility of curtailing legitimate employer expression in violation of either the First Amendment or Sec. 8(c) of the National Labor Relations Act. . . ." And since the Court of Ap-

peals has decided that Firedoor's expressions were *in the past* non-coercive in nature (*United Steel Workers, supra,* p. 370), it is our submission that its unwarranted *judicial projection into the future,* of the curtailment of allegedly "coercive" expressions by this employer (contrary to its record and behavior in the past), raises a fundamental question of the fixation of the reasonable statutory and constitutional limits within which an employer may safely undertake to communicate with his employees, which this Court should resolve.

Failure to precisely delineate the standards, tests and criteria to be applied in situations comparable to those at bar would leave an employer's elementary right of communication *in limbo* and subject to the unpredictable whims and caprices of unions or of the Board whenever they believed some chance remarks or conversations might, *in future,* have a "coercive" effect on employees. The possibility of such curtailment of an employer's right of free expression vis-a-vis his employees, raises statutory and constitutional questions of the most far-reaching importance in labor relations law, which this Court is respectfully requested to set at rest.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

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APPENDIX

Statutes

29 U.S.C. "Sec. 158(c). The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

U. S. Constitution, First Amendment.

Appendix.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. FIREDOOR CORPORATION OF AMERICA, Respondent.	No. 26483

DECREE

Before: LUMBARD, Chief Judge, CLARK and SMITH, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on June 15, 1960. The Court heard argument of respective counsel on February 14, 1961, and has considered the briefs and transcript of record filed in this cause. On June 9, 1961, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit, that the said order of the National Labor Relations Board in said proceeding be enforced, and that

Firedoor Corporation of America, its officers, agents, successors and assigns abide by and perform the direction of the Board in said order contained.

CHARLES E. CLARK
Judge, United States Court of Appeals for the Second Circuit

J. JOSEPH SMITH
Judge, United States Court of Appeals for the Second Circuit

Filed: June 22, 1961.
A true copy

A. DANIEL FUSARO,
Clerk.

Appendix.

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 240—October Term, 1960.

(Argued February 14, 1961 Decided June 9, 1961.)

Docket No. 26483

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

FIREDOOR CORPORATION OF AMERICA,

Respondent.

Before:

LUMBARD, *Chief Judge,*
CLARK and SMITH, *Circuit Judges.*

Petition by the National Labor Relations Board for enforcement of its orders based upon unfair labor practice findings. 127 N. L. R. B. No. 144.

Enforcement granted.

GLEN M. BENDIXSEN, Attorney, National Labor Relations Board (Stuart Rothman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, As-

sistant General Counsel, Samuel M. Singer, Attorney, National Labor Relations Board, Washington, D. C., on the brief), *for petitioner.*

Leo M. Drachsler, New York, N. Y. (Sidney O. Raphael, and Raphael, Searles, Levin & Vischi, New York, N. Y., on the brief), *for respondent.*

Lumbard, *Chief Judge:*

On the petition for the N. L. R. B. for enforcement of its orders against Firedoor Corporation, 127 N. L. R. B. No. 144, we have to resolve the usual question of whether there is in the record substantial evidence to support the Board's unfair labor practice findings and whether the orders are appropriate to remedy the conduct which the Board condemns. The Board found that the Firedoor Corporation had violated § 8a(1), (2) and (3) of the National Labor Relations Act, 29 U. S. C. § 158, by restraining its employees in their efforts to join Local 66 of the American Federation of Technical Engineers, AFL-CIO, by supporting and dominating the "Employee Bargaining Committee," a company union set up by Firedoor to compete with Local 66, and by discharging two employees because of their activity on behalf of Local 66. We find substantial evidence in the record considered as a whole to support the Board's findings, and accordingly we direct enforcement of its orders, which we hold to be appropriate remedies for the unfair labor practices committed. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951).

This dispute involves thirteen of Firedoor's employees who were engaged, as of November 1958, in drafting and related technical work necessary to the company's manu-

facture of hollow metal doors. The record supports the following findings of the Board:

Late in November of 1958, the union notified Firedoor of its claim to represent a majority of these men and petitioned the Board for an election. Shortly thereafter, Barry Mirsky, a supervisor of the technical work, asked seven or eight of the men, including Alvin Zeleznik and Richard Campagnola, who were later discharged, whether they were members of the union. All forswore membership. The next day, Mirsky asked the men to sign a petition addressed to the Board which stated that the union did not have their support. All but one refused to sign.

Thereafter on December 12, 1959, Firedoor's vice president, Bernard A. Schecter, spoke to the assembed employees, saying that signing the petition would have been a vote of confidence in the company, that certain benefits were cancelled and that, despite the election petition pending before the Board, the employees must immediately decide whether they opted for the union.[1] The employees did not make the decision as requested and Firedoor's next move was to have Mirsky convey President Bernard J. Sussman's offer to give them anything contained in a contract between the union and another manufacturer of metal doors if they bargained directly with the company and abandoned the union.

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[1] The trial examiner found that the men immediately held a meeting at which they voted to put off their decision until the Board-conducted election and appointed a committee of four, including Zeleznik and Campagnola, to inform Schecter of their decision. When confronted by the committee Schecter said that the employees had misunderstood his reference to the cancelled benefits and that the only cancellation would be of a proposal relating to work on the Fridays following Christmas and New Year's. In "an angry voice," however, he reiterated his demand that the employees make an immediate decision on whether to have a union.

The Board neither mentions this incident nor, apparently, rejects the finding.

Appendix.

In January and February of 1959, President Sussman twice requested Zeleznik to assist him in his efforts to persuade the employees to abandon the union. In February, Vice President Schecter told trainees Angel Garbizu and Raymond Orsi that they could not have the second of promised quarterly pay increases "because of the union" telling Orsi that if he could "get those * * * damn guys in the back to drop out of the union the trainees would receive their raises."[2] Mirsky similarly explained the cancellation of the pay increases to Orsi. In March, as is discussed more fully below, Zeleznik and Campagnola were discharged.

With the Board-conducted election due to occur on April 23, Schecter addressed the eight remaining[3] employees on April 17. He told them their last chance to negotiate privately with the company was at hand and they decided to prepare a contract. After several hours of discussion and some negotiations, all during working hours (for which they were paid), a contract was agreed upon to become effective if the union lost the election.

The union was defeated by a 4-4 tie vote but apparantly the agreement, which had provided little more than what was already in effect, was never executed.

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[2] At the hearing Schecter testified that he had told the men that they could not be given the promised increases because the union would file charges alleging that the pay raise illegally influenced the men. The trial examiner found, however, that the union had notified Firedoor that it would not object to the increases. Even apart from this notification, the statement might not have been made in good faith since the quarterly pay increase procedure had been agreed upon before the union's appearance. If not made in good faith it would have a coercive effect upon the men, assuming of course that they understood why the employer's claim was rebutted by the fact that the agreement antedated the union's appearance.

[3] The decrease from thirteen to eight employees is acounted for as follows: Zeleznik and Campagnola were fired on March 13, and Albert Romano, Orsi and Garbizu resigned after February and before the April 17 meeting. None were replaced.

Appendix.

The findings made by the Board were all supported by substantial evidence and clearly justify its orders that Firedoor cease and desist from threatening its employees with reprisals if they engaged in union activities, or did not engage in concerted activity supported by the company, and from promising benefits for the converse conduct. Equally proper was the Board's order that the employer cease and desist from dominating, interfering with or furnishing financial or other support to the Employee Bargaining Committee and from recognizing it or any similar committee as the representative of its employees.

The Board also ordered the employer to cease and desist from "interrogating its employees as to their union • • • affiliations in a manner constituting interference, restraint or coercion." Though we think that this also should be enforced, it merits somewhat fuller discussion. In brief our conclusion is that Mirsky's interrogation of the employees was not an unfair labor practice, but that in light of the unfair labor practices committed after the interrogation the Board could infer that future interrogation might be coercive and, therefore, order Firedoor not to interrogate its employees in a coercive manner.

Interrogation of employees is legal, when the questioning is not accompanied by any explicit threats, cf. *N. L. R. B.* v. *Beaner Meadow Creamery*, 215 F. 2d 247 (3 Cir. 1954), if under all the circumstances coercion is not implicit in the questioning. *Matter of Blue Flash Express, Inc.* 109 N. L. R. B. 59 (1954); *N. L. R. B.* v. *Armco Drainage &Metal Prod.*, 220 F. 2d 573, 582 (6 Cir. 1955), *cert. denied*, 358 U. S. 838; *N. L. R. B.* v. *Assoc. Dry Goods Corp.*, 209 F. 2d 593 (2 Cir. 1954); *N. L. R. B.* v. *Syracuse Color Press*, 209 F. 2d 596 (2 Cir. 1954).[4] The most rele-

[4] See earlier cases holding that interrogation was *per se* illegal, *Standard-Coose-Thatcher*, 58 N. L. R. B. 1358 (1949); *N. L. R. B.* v. *Dixon*, 184 F. 2d 521 (8 Cir. 1950); cf. *Texarkana Bus Co.* v. *N. L. R. B.*, 119 F. 2d 480 (8 Cir. 1941).

vant afctors are whether there has been a background of employer hostility to and discrimination against the union[5] and whether the questions seem to seek information which the employer in good faith needs—as when individuals are asked whether they belong to the union so that the employer can check the union's claim to represent a majority[6] or, to the contrary, seem to seek information most useful for discrimination—as when employees are asked who organized the union or whether named fellow workers belong.[7] Other relevant factors are whether the identity of the questioner and the place or method of interrogation imbue the interview with an unnatural formality which tends to intimidate the employee and, to a lesser extent, whether the employees did conceal their allegiance or denied membership when they actually had not made up their mind and, therefore, became unwilling to take an active part in later organizational activity or even, in the case of a small unit, afraid to vote their true convictions at a later Board-conducted election. See *Syracuse Color Press, supra; Blue Flash Express, Inc., supra* [dissenting opinion].

The interrogation of the employees was not improper under these standards. There was no past history of anti-

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[5] *N. L. R. B.* v. *Hill & Hill Truck Line, Inc.*, 266 F. 883 (5 Cir. 1959); *N. L. R. B.* v. *Wagner Iron Works*, 226 F. 2d 126, 130 (7 Cir. 1955), cert. denied, —— U. S. ——; *N. L. R. B.* v. *Chautauqua Hardware Corp.*, 192 F. 2d 492 (2 Cir. 1951); compare *N. L. R. B.* v. *Protein Blenders*, 215 F. 2d 749 (8 Cir. 1954); *N. L. R. B.* v. *Arthur Winer, Inc.*, 194 F. 2d 370 (7 Cir. 1952), cert. denied, 344 U. S. 819.

[6] *Blue Flash Express, Inc. supra; N. L. R. B.* v. *Peerless Products*, 264 F. 2d 769 (7 Cir. 1959); cf. *N. L. R. B.* v. *Superior Co.*, 199 F. 2d 39 (6 Cir. 1952).

[7] *N. L. R. B.* v. *Midwestern Instruments, Inc.*, 264 F. 2d 829 (10 Cir. 1959); *N. L. R. B.* v. *Syracuse Color Press, supra; N. L. R. B.* v. *Swan Fastener Corp.*, 199 F. 2d 935 (1 Cir. 1952).

union discrimination. Mirsky had reason to check the union's claim of majority status for the claim came as a "complete surprise" to him;[8] the questioning was limited to whether the questioned employee belonged to the union; Mirsky worked closely with the men and questioned them in a casual manner. Though the men all denied membership they were not thereby cowed into avoiding any pro-union stands for the very next day all but one refused to sign an anti-union petition.

Even though the interrogation was proper, the Board's injunction against any future coercive questioning should be enforced. The coercive and discriminatory conduct after the questioning makes it reasonable to conclude that any future interrogation would have a coercive effect upon the employees. The Board has power to enjoin conduct other than those specific violations proved so long as there is a reasonable relation between the illegal act committed and the forbidden activity. *May Stores Co.* v. *N. L. R. B.*, 326 U. S. 376, 390 (1945); cf. *United States* v. *Dupont*, —— U. S. ——, decided May 22, 1961.

The Discriminatory Discharges

In addition to these cease and desist orders, the Board ordered Firedoor to offer reinstatement to Zeleznik and Campagnola and to repay them for any lost earnings caused by their discharges which it held to be discriminatory. We agree that they were discharged because of their union activity and therefore enforce the Board's order.

Firedoor believed that Zeleznik, its oldest and highest paid technical employee, was a leader in the union movement, though in fact he did not sign a union card until late

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[8] Had the union requested immediate recognition and bargaining there may have been far more reason for the employer to make inquiry. Compare *N. L. R. B.* v. *Armco Drainage and Metal Prod.*, 220 F. 2d 573, 582 (6 Cir. 1955), cert denied, 358 U. S. 838.

January. Thus Sheeter frequently greeted him with remarks such as "Hello, Shop Steward" or "How's the ringleader?" Zeleznik, moreover, refused President Sussman's request to "talk the fellows out of the union" and Mirsky's request that he sign the anti-union petition. He also asked Sussman if it were not true that company union contracts "were not worth the paper they were written on." Mirsky's comment to him on the evening of March 13, the day of discharge, that "the union situation * * * had gotten out of hand," suggests that the company fired him because it believed that he was a union supporter and a trouble-maker.

The evidence from which the Board inferred that Campagnola was fired because of his union activity, though less compelling than the Zeleznik evidence, is sufficient. Though there was no direct evidence that the company knew of his activity in organizing the union, he did refuse to sign the anti-union petition and Mirsky, when discussing his discharge said "you know the reason why I can't help you." It is significant, moreover, that he was fired by Sussman on the same day as was Zeleznik.

The foregoing evidence made out a prima facie case that the discharges were motivated by anti-union animus. The employer's rebuttal evidence—consisting of a claim that the discharges carried out a policy of retrenchment—does not leave us with the firm conviction that the Board was wrong.

It is true that Firedoor's monthly sales declined from $254,000 in October to $50,000 in December and $58,000 in February,[9] and that neither Campagnola or Zeleznik nor the three men who resigned were replaced. But President Sussman had in early January assured all the technical employees that they need not fear losing their jobs because of slack business conditions and Campagnola had been told

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[9] The Board discounted this evidence because Firedoor did not prove that the drop was not seasonal.

by Mirsky in January that his position was secure. It is worth noting that December, the month preceding these assurances, had an area lower sales total than February, the month preceding the discharges. Moreover, it is unlikely that Campagnola and Zeleznik, who were the company's most experienced employees and both of whom had been used to train novices, would have been the only men to be fired for economic reasons. There is no evidence that any of Firedoor's 100 production and maintenance employees were fired. Among the technical employees themselves, Zeleznik and Campagnola represented the greatest investment. Though they also were the highest paid, Firedoor's contention that they were fired because that would be the greatest saving is rebutted by Firedoor's offer in February to Garbizu, a trainee who had resigned, to increase his wages if he would return. From all this evidence the Board could properly infer that the men were discharged because of their union activity; its remedial orders are appropriate to remedy the respondent's unfair practices.

Enforcement ordered.

Appendix.

Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FIREDOOR CORPORATION OF AMERICA,

Respondent.

PETITION FOR REHEARING

Raphael, Searles & Vischi, New York, N. Y., for respondent.

Petition for rehearing denied.

C. E. C.

J. J. S.

U.S.C.JJ.

29 June 1961

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 423

FIREDOOR CORPORATION OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 14–22) is reported at 291 F. 2d 328. The Board's decision and order (R. 2–63) [1] are reported at 127 NLRB 1123.

JURISDICTION

The opinion and judgment of the court of appeals were entered on June 9, 1961 (Pet. 12–13). Petitioner's request for rehearing was denied on June 29, 1961 (Pet. 23). The petition for a writ of certiorari

[1] "R." refers to the portions of the record printed as an appendix to the brief filed by the Board in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

was filed on September 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the court below properly enforced that portion of the Board's order requiring petitioner to cease and desist from coercive interrogation of its employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 158, 160, are as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *.
>
> * * * * *
>
> Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *
>
> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In October 1958, organizational activities on behalf of the Union [2] were begun among the 13 "technical" employees of petitioner ("the Company") (R. 6, 19, 40; 74, 185). In October and November, some of the employees signed Union cards which were distributed by employees Romano and Campagnola (R. 6, 40; 74). On November 24, the Union filed a petition with the Board for an election in a unit consisting of listers, take-off men and draftsmen. The same day, the Union informed the Company that it represented a majority of these employees and apprised the Company of its election petition (R. 21; 85–87).

In early December, Barry Mirsky, supervisor of the drafting and listing work, asked at least seven of the employees, including Campagnola and Zeleznik, if they were members of the Union; each denied that he was a member (R. 2, 21; 170–172). On December 11, Mirsky requested the employees to sign a petition, prepared by the Company and addressed to the Board, to the effect that they were not contacted by the Union or were not Union members and that they were revoking all actions taken by the Union on their behalf. All but one of the employees refused to sign the petition (R. 3, 21; 174–175). On December 12, at a meeting of the employees on Company time, the Company's executive vice president, Bernard A. Schecter, referred to a letter from the Union which accused the

[2] Architectural and Engineering Guild, Local 66, American Federation of Technical Engineers, AFL–CIO.

Company of trying to coerce the employees to sign the petition, and told the men that their signing of the petition would have been a vote of confidence in the Company. Schecter also announced that he was cancelling certain benefits theretofore enjoyed by the employees, such as sick leave and wage increases for apprentices. Finally, he requested them to decide "right away" whether they wanted the Union, without awaiting the results of a Board-conducted election (R. 3, 21, 25–26; 66–67, 75–76, 90–93, 117–118, 130–133, 172–174, 177–179, 184–186, 191–193). Following Schecter's remarks, the employees appointed a committee—consisting of Romano, Campagnola, Higgins, and Zeleznik—to tell Schecter that they would await a Board election before determining whether they wanted Union representation, and to find out if he really intended to cancel certain benefits (R. 26, 44, 76). When informed of the decision to await an election, Schecter became angry and again demanded an immediate answer, but the employees adhered to their position (R. 26–27, 44–45; 68–69, 76–79, 93–96, 133–135, 186–187, 193–194).

On January 5, 1959, the Company's president, J. Bernard Sussman, told the employees that he was disappointed with them for seeking Union representation, that he did not wish to have a third party between himself and the employees, and that they need have no fear about layoffs. He suggested that they form a committee to discuss their grievances with him and to formulate proposals. (R. 5–6, 22, 27–28; 69, 79–80, 96–99, 135–137, 175–176, 179–180, 199–203). Mirsky encouraged them to bargain with

the Company and forget about the Union (R. 28–29; 180). The next day, when the employees advised the Company they intended to wait for the Board election, Supervisor Mirsky told the employees in the drafting room, "All right, gentlemen. you have had it now" (R. 29; 71, 102, 141).

Twice during January and early February, President Sussman called Zeleznik into his office and asked him as senior man to talk his fellow employees out of joining the Union. Zeleznik refused, and, instead, signed a Union card (R. 6, 36–37; 108–109, 114, 203–204). On January 19, Mirsky showed the employees a copy of a contract between the Union and another employer, and conveyed to them Sussman's statement that he would give them anything in the contract if they bargained directly with him and abandoned the Union (R. 3, 22, 46; 71–72, 103, 120, 142, 180, 183–184). On January 27, the Union told the Company it would not object to the Company's granting periodic pay increases due trainees (R. 33, 46; 169, 195–198, 205, 209–210). During February, however, the Company informed its trainees, Garbizu, Orsi, and Immerman, that promised wage increases could not be given them because the other employees wanted to get into the Union (R. 3–4, 32–33, 46; 115–116, 121–122, 166–168, 194–195).[3]

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[3] Schecter and Mirsky told Orsi, for example, that, while he deserved a raise, the Company could not give him one because of the Union; Schecter assured him, however, that if he "were to get those damn guys in the back to drop out of the Union, the trainees would receive their raises" (R. 4, 32, 46; 121–122, 194–195).

On March 13, Zeleznik was fired by the Company (R. 5–6, 33–38; 87–90, 103–114, 119, 171, 176–177, 182–183, 198–204). Two weeks later, Mirsky told Zeleznik that he might be able to talk the Company "into taking him back" if Zeleznik "denounced the Union" (R. 38; 114). Similarly, on March 13, the Company discharged Campagnola (R. 2, 6–7, 39–40, 50; 72–75, 82–85, 177, 190).

On April 6, the Board directed that an election be held on the Union's petition (R. 22; 86). On April 17, Schecter told the "technical" employees that this was their last chance for private negotiations with him, and noted the Union's inability to secure a contract with another employer. He also told them that the Company was in poor financial condition. The employees then decided to draft a list of proposals to submit to Schecter (R. 4, 22, 30, 47; 123, 142–143, 156–158, 188). On April 21 and the following day, the employees negotiated with Schecter, on Company time and property, on the proposals and his counter-proposals (R. 22, 30; 124–128, 144–152, 159–165, 181, 188–190). On April 22, agreement was reached, and Schecter promised formally to execute the contract with the employee bargaining committee on April 24, effective April 27, if the Union lost the election (R. 23, 31; 128–130, 152–156, 161, 165, 182, 191). The Board election was held on April 23, 1959. Eight employees voted, 4 for representation by the Union and 4 against (R. 23; 85–87). The agreement promised by the Company was never executed (R. 23; 129–130).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the Company violated Section 8(a)(1) of the Act by the following activities: interrogating employees concerning their union membership and activities; urging employees to persuade others to abandon the Union; preparing a petition for signatures of employees to the effect that they repudiated the Union; promising them benefits if they abstained from union activities; withholding wage increases due some employees because of the advent of the Union; and urging the employees to deal directly with the Company. The Board further found that the Company violated Section 8(a)(2) and (1) of the Act by dominating, interfering with, and furnishing assistance to the formation and administration of the employee bargaining committee. Finally, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employees Zeleznik and Campagnola because of their Union sympathies and activities (R. 2–8).*

The Board's order required the Company to cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act. In particular, as to the issue raised by the petition here, the Board's order required the Com-

*One member of the Board dissented from the finding that Zeleznik and Campagnola were discriminatorily discharged (R. 7–8).

pany to cease and desist from: "Interrogating its employees as to their union activities, interests, or affiliations, in a manner constituting interference, restraint, or coercion; * * *" (R. 8). Affirmatively, the Company was required to offer reinstatement to the discharged employees and to make them whole for any loss of pay suffered by reason of the discrimination against them; to withdraw, and withhold recognition from, and disestablish the employee bargaining committee; and to post appropriate notices (R. 8–15).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's order in full (Pet. 14–22). While the court disagreed with the Board's finding that Supervisor Mirsky's interrogation of the employees was coercive within the meaning of Section 8(a)(1) of the Act, it nevertheless held that "in the light of the unfair labor practices committed after the interrogation the Board could infer that future interrogation might be coercive and, therefore, order Firedoor not to interrogate its employees in a coercive manner" (Pet. 18).

ARGUMENT

Petitioner's sole contention is that the Board's order as enforced is too broad because it enjoins future coercive questioning as to the employees' Union activities, despite the fact that the court of appeals found that the interrogation, as conducted in this case, was not itself unlawful. This issue presents no question warranting review by this

Court. The issue is of no practical importance, for—in light of the uncontested validity of the clause of the Board's order which prohibits "In any other manner interfering with, restraining, or coercing employees in the exercise of the rights * * * to engage in other concerted activities" (R. 9–10)—"interrogating its employees as to their union activities, interests, or affiliations, in a manner constituting interference, restraint, or coercion" (R. 8) would constitute a violation of the Board's order whether or not separately enjoined.

Moreover, the specific prohibition of the coercive repetition of the conduct which the court of appeals held innocent was clearly proper on the facts of this case even if the court was correct. It is settled that a Board order may enjoin not only the particular unfair labor practice found but also like or related acts which may be anticipated from the wrongdoer's past misconduct. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 436.[8] Contrary to petitioner's assumption (Pet. 8–9), the possibility of future coercive interrogation could fairly be anticipated from a combination of the employer's manifested "attitude of opposition to the pur-

[8] *National Labor Relations Board* v. *International Hod Carriers, Local 1140*, 285 F. 2d 394 (C.A. 8), cited at page 8 of the petition, is irrelevant here. The issue in that case, involving a secondary boycott situation, was whether the Board's order could properly enjoin the union from exerting secondary pressure not only against the employees of named employers but also those of "any other employer or person." Cf., *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 705–706.

poses of the Act"* and the interrogation of employees which actually took place.

Thus, while the court rejected the Board's finding that the questioning conducted in this case tended to restrain or coerce the employees in violation of Section 8(a)(1), it upheld the Board's findings that the Company violated Section 8(a)(1) by urging employees to persuade others to abandon the Union, preparing a union-repudiation petition, threatening employees with reprisals if they adhered to the Union, promising benefits for abstaining from union activities, withholding wage increases, and urging the employees to deal directly with the Company. Moreover, the court sustained the Board's Section 8(a)(2) and (3) findings respecting the Company's unlawful formation and administration of an employee committee and its discriminatory discharge of two Union adherents. In view of these findings, which reveal a patent effort to defeat unionization by whatever means necessary, the court below could justifiably conclude, as it did, that past interrogation might be repeated and that, if repeated, it "would have a coercive effect upon the employees" (Pet. 20). Accordingly, the proscription against future coercive interrogation embodied in the order as enforced touched upon violations that "bear some resemblance to that which the employer has committed" (*Express Publishing Co., supra,* 312 U.S. at 437), and was well "adapted to the situation which calls for redress."

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* *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 392.

National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348. See also, *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 390–392.[1]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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October, 1961.

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[1] Petitioner's contention (Pet. 4–6) that the order constitutes a blanket prohibition against all future interrogation, regardless of subject matter or manner, which raises questions under the First Amendment and Section 8(c) of the Act, is plainly without substance, as a reading of the relevant portion of the order readily discloses. The order proscribes interrogation of employees "as to their union activities, interests, or affiliations, in a manner constituting interference, restraint, or coercion * * *" (R. 8), and nothing more. This specific and definitive order in no way interferes with the Company's right to engage in lawful and reasonable communication with its employees.

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